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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEC 13 2011

JAMES R. LARSEN, CLERK
DEPUTY
YAKIMA, WASHINGTON

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5 U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 Carl H. Plumb, pro se

7 Plaintiff,

8 vs.

9 BARCLAYS BANK DELAWARE, ET AL.
Defendants.

NO. CV-11-3090-RMP

PLAINTIFF'S OPPOSITION
TO DEFENDANT
BARCLAYS BANK
DELAWARE'S MOTION TO
DISMISS

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12 **PLAINTIFF'S OPPOSITION TO DEFENDANT BARCLAYS BANK**
13 **DELAWARE'S MOTION TO DISMISS**
AND MEMORANDUM OF LAW

14 Plaintiff, Carl H. Plumb, hereby submits this opposition to Defendant
15 Barclay Bank Delaware's (Barclays) Motion to Dismiss Plaintiff's Complaint and
16 Memorandum of Law, and states:

17 When considering a 12(b)(6) motion to dismiss, the court must accept as true
18 all facts set forth in the plaintiff's complaint and limit its consideration to the
19 pleadings and exhibits attached thereto. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
20 556 (2007); *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009).

1 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
2 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v.*
3 *Iqbal*, 129 S.Ct 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). Although
4 the complaint must contain factual allegation that "raise a reasonable expectation
5 that discovery will reveal evidence of" the plaintiff's claims, *id.* at 556, "Rule
6 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because 'it
7 strikes a savvy judge that actual proof of those facts is improbable,'" *Watts v. Fla.*
8 *Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at
9 556).

10 All the allegations of the complaint are to considered true and considered in
11 a light most favorable to the plaintiff and all doubts or inferences are to resolved in
12 the plaintiff's favor.

13 Under Federal Rule 12(b)(6), the Court must deny the Defendant's motion to
14 dismiss unless the Defendant demonstrates "beyond doubt that the Plaintiff can
15 prove no set of facts in support of [its] claim that would entitle [it] to relief."
16 *Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir.1997). In making this
17 determination, the Court must also "accept the factual allegations in the Plaintiff's
18 complaint and must construe those facts in the light most favorable to the
19 Plaintiff." *Id.*

1 Defendant's allegation that Plaintiff has not alleged a single wrongful act by
2 Barclays is not true, since the Complaint repeatedly alleges that Barclays is liable
3 for the actions of its agents, referring to the Collection Agencies collecting on its
4 behalf. Defendant blindly ignores a number of Barclay's wrongful acts alleged by
5 Plaintiff. Comp. ¶¶ 24, 28, 55, 59, 83, 92, 104. Defendant even admits in its
6 Memorandum in Support of Motion To Dismiss, that Plaintiff has alleged that
7 Barclays is liable based on, "the law of agency." Memo. ¶ B, p. 5.

8 Civil Rule 8(a) created the liberal notice pleading standard, that requires
9 only "a short and plain statement of the claim showing that the pleader is entitled to
10 relief." Plaintiff is not required to prove his entire case but to provide a short and
11 plain statement that puts the Defendant on notice, which Plaintiff has done.
12 Plaintiff has clearly stated that Barclays is liable under the law of agency.

13 Defendant's Motion To Dismiss is based almost entirely on the notion that
14 Barclays cannot be held vicariously liable for any conduct of its agents. Barclays
15 implies that Plaintiff has failed to plead facts to support an agency relationship
16 including whether an agent has "actual or apparent authority." Defendant's
17 allegation is false. The Complaint alleges that Barclays' agents (Plaza and FRS in
18 particular) claimed that they were collecting on behalf of Barclays. Comp. ¶¶ 25,
19 29.

1 On the other hand, Barclays has failed to allege that its agents had or did not
2 have authority or "actual or apparent authority", nor allege that its agents were
3 acting outside of their authority. Barclays fails to provide facts or to attach proof
4 of its relationship with its agents, which it should be well able to do, which would
5 settle the question of "vicarious liability". Barclays complains of Plaintiff's lack of
6 pleading "facts to support the agency relationship", when the evidence regarding
7 the extent and nature of Barclays' agents' authority is a matter that could only be
8 discovered through the discovery process. Defendant is in possession or control of
9 such evidence or information that would lead to discovery of such evidence.

10 Plaintiff is allowed discovery of any matter relevant to its claims, if the discovery
11 appears reasonably calculated to lead to the discovery of admissible evidence.
12 FRCP 26(b). Plaintiff has a right to inquire into this and other material issues
13 through discovery, and it is likely that the desired facts will come out in discovery.

14 Defendant has made this issue the centerpiece of its motion and a material
15 issue that must be settled. Therefore, Defendant must provide facts through
16 discovery establishing the nature of its relationship with its agents. In order for
17 this motion to prevail, Defendant must establish that there is no conceivable set of
18 circumstances that could exist, or be found through discovery, that could make
19 Barclays liable for its agents conduct. Defendant has not proved this. Granting
20 Defendant's motion would be inappropriate and premature, since it would deprive

1 Plaintiff of its right to discovery, and also because development of facts through
2 discovery would help the court in assessing the propriety of claims in this case.

3 Plaintiff alleges wrongful acts of Barclays through its agents (as Defendant
4 repeatedly agrees), which brings us to the question concerning Barclays' liability
5 for the conduct of its agents. Barclays seems to imply that it did not have any
6 agency relationship with its agents, but this would be strange indeed, considering
7 that fact that the agents claimed they were collecting an alleged debt on behalf of
8 Barclays. Barclays cannot rely on a baseless denial of vicarious liability without
9 documented evidence establishing the nature of the relationship Barclays has with
10 its agents. At this point Defendant has not provided facts concerning its
11 relationship with its agents.

12 The law of agency establishes that, (a) person conducting an activity through
13 servants or other agents is subject to liability for harm resulting from his conduct if
14 he is negligent or reckless: (a) in giving improper or ambiguous orders or failing to
15 make proper regulations; or (b) in the employment of improper persons or
16 instrumentalities in work involving risk of harm to others; (c) in the supervision of
17 the activity; or (d) in permitting, or failing to prevent, negligent or other tortious
18 conduct by persons, whether or not his servants or agents, upon premises or with
19 instrumentalities under his control. *Restatement Of The Law (Second) Agency*
20 *(1958) Section 213.*

1 Whether or not Barclays intended the conduct of its agents, it is still liable
2 for its agents conduct. "A master or other principal who unintentionally authorizes
3 conduct of a servant or other agent which constitutes a tort to a third person is
4 subject to liability to such person." *Restatement Of The Law (Second) Agency*
5 *(1958) Section 215.*

6 "Whether or not an act is authorized depends upon the interpretation of the
7 manifestation of the principal. The principal may authorize an act not intending
8 and not advertent to such act, and having no reason to believe that the act will be
9 done. If the agent reasonably misunderstands the principal's meaning which is
10 ambiguous in light of the circumstances, and acts believing that he is carrying out
11 the principal's instructions, the act is authorized. . . . If the act is authorized, the
12 master or other principal is subject to liability...". *See id.*

13 A master or other principal may be liable to another whose interests have
14 been invaded by the tortious conduct of a servant or other agent, although the
15 principal does not personally violate a duty to such other or authorize the conduct
16 of the agent causing the invasion. *Restatement Of The Law (Second) Agency*
17 *(1958) Section 216.*

18 Plaintiff respectfully requests that the Court take notice of the well-pleaded
19 allegations of the *pro se* Plaintiff's complaint, which this Court must accept as true
20 at this juncture of the proceedings, and which, in light of the Plaintiff's *pro se*

1 status, the Court must hold to a less stringent standard than formal pleadings
2 drafted by an attorney and construe liberally. *See Haines v. Kerner*, 404 U.S. 519,
3 520, 92 S.Ct. 594, 596, 30 L.Ed. 2d 652 (1972).

4 WHEREFORE, Plaintiff requests that the Court deny Barclays' Motion to
5 Dismiss.

6 Dated: December 12, 2011

7 Respectfully submitted,

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Plaintiff,

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NO. CV-11-3090-RMP

8 BARCLAYS BANK DELAWARE, ET AL.
 9 Defendants.

DECLARATION OF
 MAILING

10 **Declaration of Mailing**

11 I, Carl Plumb, the undersigned do certify the following under penalty of
 12 perjury under the laws of the State of Washington: I am a citizen of the United
 States of America, and of the State of Washington, over the age of 21 years, a party
 13 to the above entitled proceeding and competent to be a witness therein. I certify
 that on December 12, 2011 I deposited into the U.S. Mail postage prepaid, a true
 14 copy of the Plaintiff's Opposition to Defendant's Motion To Dismiss and a copy of
 this Declaration of Mailing addressed to the following:

15 Clerk of the Court
 United States District Court
 16 Eastern District of Washington
 P.O. Box 2706
 17 Yakima, WA 98907

18 Lane Powell PC
 1420 Fifth Avenue, Suite 4100
 19 Seattle, WA 98101-2338

20 Declaration of Mailing

PAGE 1 OF 2

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Dated: December 12, 2011 at Yakima, Washington. By


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Declaration of Mailing

PAGE 2 OF 2

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